IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No.

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ET AL,
Defendants-Appellants

Versus

ROY S. WILSON,
Plaintiff-Appellee

BRIEF OF DEFENDANTS-APPELLANTS IN OPPOSITION TO MOTIONS OF APPELLEE TO DISMISS OR AFFIRM

May It Please the Court:

The Appellee filed herein motions to dismiss or affirm pursuant to Paragraph 3 of Rule 12 of the Rules of the Supreme Court in response to the jurisdictional statement filed by appellants.

The complaint, praying for the issuance of a preliminary injunction, was filed in the United States District Court, Eastern District of Louisiana, Baton Rouge Division, and a

specially constituted District Court of the United States was convoked under the authority of Title 28, United States Code, Section 1343; Title 8, United States Code, Section 43; and Title 28, United States Code, Section 2281.

The order attacked was a resolution adopted by Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, a public corporation, organized and existing under the laws of the State of Louisiana, and particularly the Constitution of Louisiana of 1921, Article XII, Section 7, and Louisiana Revised Statutes of 1950, Title 17, Section 1451, et seq., which said resolution reads as follows:

> "BE IT RESOLVED that pursuant to the laws of Louisiana and the policies of this Board the administrative officers are hereby directed to deny admission to the following applicants: Nephus Jefferson, Dan Columbus Simon, Willie Cleveland Patterson, Charles Edward Coney, Joseph H. Miller, Jr., Roy Samuel Wilson, Lloyd E. Milburn, Lawrence Alvin Smith, Jr., James Lee Perkins, Edison George Hogan, Harry A. Wilson, Anderson Williams."

Board of Supervisors of Louisiana State University and Agricultural and Mechanical College objected to the jurisdiction of the specially constituted District Court of the United States on the authority of the following, among other, cases, to-wit: *Railroad Commission of Texas v. Pullman Company,* 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971; *Phillips v. United States,* 312 U.S. 246, 61 S. Ct. 480, 85 L. Ed. 800; and *Borges v. Loftis,* 87 Fed. 2d 734, 301 U. S. 687, 57 S. Ct. 789, 81 L. Ed. 1344, 301 U. S. 714, 57 S. Ct. 928, 81 L. Ed. 1366.

The specially constituted District Court took jurisdiction under the statutes above mentioned in spite of the authorities above cited, as the complainant had brought the action on his own behalf and on behalf of other Negro citizens of the United States residing in the State of Louisiana to be admitted to the Law School of Louisiana State University and Agricultural and Mechanical College, and prayed for a preliminary injunction restraining the named defendants from making any distincton on the basis of race or color in the consideration of plaintiff or any other applicant for admission to the Law School of Louisiana State University and Agricultural and Mechanical College.

The defendants answered the complaint and defended, in effect, on the ground that the State of Louisiana maintains separate schools for white and colored residents, that two Law Schools are maintained by the State of Louisiana, one of which is located at Louisiana State University and Agricultural and Mechanical College and is for white students, and the other is located at Southern University and is for colored students, both of which offer equal facilities for a legal education and admission to the bar of the State of Louisiana, and that, therefore, plaintiff and all others similarly situated are required under the law to attend Southern University Law School and are not eligible for admission to the Law School of Louisiana State University and Agricultural and Mechanical College.

The defendants offered the evidence that was immediately available within the short time allowed before trial, which evidence showed, among other things, that the State of Louisiana had appropriated for the past year an amount

of some $2800.00 for each law student of Southern University and some $600.00 for each law student of Louisiana State University and Agricultural and Mechanical College, that the faculty, equipment and facilities of both schools are substantially equal and are adequate and sufficient to fully educate and equip a student to practice law in the State of Louisiana and that graduates of both institutions have the same rights under the law to be admitted to the bar of the State of Louisiana.

The specially constituted United States District Court found for the plaintiff, but a reading of the Court's decision will show that it has misinterpreted the holdings of this Court in the cases of *McLaurin v. Oklahoma,* 94 L. Ed. 787 and *Sweatt v. Painter,* 94 L. Ed. 783.

The United States District Court abused its discretion in granting a preliminary injunction as same should not have been issued under the facts shown by defendants. The plaintiff had access at all times to Southern University Law School which satisfied the requirements of the previous holdings of this Court.

This appeal presents several serious questions of law and of fact that should be reviewed by this Court as the State of Louisiana has obviously complied in every practicable manner with the law as laid down by this Court. Appellants should not, therefore, be denied the privilege of presenting oral argument and written brief in support of their contentions.

The specially constituted United States District Court having been convoked under the above cited authorities and having rendered judgment in said case, this Honorable Court

has appellate jurisdiction under the authority of United States Code, Title 28, Section 1253. **The motions filed by appellee do not question the appellate jurisdiction of this Court.**

The motions of appellee to dismiss or affirm should, therefore, for the reasons above shown, be denied or overruled.

And defendants shall ever so pray.

Respectfully submitted,

BOLIVAR E. KEMP, JR.
Attorney General of the State of Louisiana
CARROLL BUCK
First Assistant Attorney General
HENRY C. SEVIER
C. C. BIRD, JR.
TAYLOR, PORTER, BROOKS, FULLER & PHILLIPS
C. V. PORTER
L. W. BROOKS
JAMES R. FULLER

Baton Rouge, Louisiana,
November 29, 1950.

CERTIFICATE

I, L. W. Brooks, of counsel for defendants-appellants in the above entitled action, hereby certify that on the 29th day of November, 1950, I served copies of the foregoing brief upon the attorneys for the plaintiff-appellee by depositing same in the United States mails, postpaid, addressed to them as follows:

A. P. TUREAUD,
612 Iberville Street,
New Orleans, Louisiana.

U. SIMPSON TATE,
Anderson Building,
1718 Jackson Street,
Dallas 1, Texas.

THURGOOD MARSHALL,
20 West 40th Street,
New York 18, New York.

Baton Rouge, Louisiana, November 29, 1950.

L. W. Brooks

L. W. BROOKS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 436

BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, ET AL.,

Defendants-Appellants

VERSUS

ROY S. WILSON,

Plaintiff-Appellee

PETITION OF DEFENDANTS-APPELLANTS FOR REHEARING

Defendants-appellants, on the grounds following, petition for rehearing in the above action, and in connection therewith respectfully represent:

In pursuance to a motion of appellee in this case to dismiss the appeal or to affirm the judgment of the District Court of the United States for the Eastern District of Louisiana, sitting as a three judge court, this Honorable Court, by a per curiam of date January 2, 1951, affirmed the said judgment granting an interlocutory injunction against these petitioners, citing

without comment *Sweatt v. Painter*, 94 L. Ed. 783, and *McLaurin v. Oklahoma*, 94 L. Ed. 787.

Petitioners contend that this Honorable Court should in no event have affirmed the judgment without a hearing upon the appeal before this Honorable Court.

Petitioners contend that the three judge District Court did not have jurisdiction to entertain this action. Such a court should only have entertained this action if it were an action to have declared unconstitutional some statute of a state or some administrative order having the force and effect of a statute. There is no constitutional or statutory provision in Louisiana that is being attacked in this action. There is no order "made by an administrative board or commission acting under State statutes" which is being attacked as unconstitutional.

In the case of *McLaurin v. Board of Regents*, cited by this Court and relied on by counsel for present plaintiff, counsel for this plaintiff said that the action of the defendant Board of Regents was "operating under a statute which provided that the Board be constituted a 'body corporate.'" Counsel then stated that that statute giving general powers to the Board of Regents of the University of Oklahoma was identical in effect to the statute giving general powers to the Board of Supervisors in this instant case.

This is overlooking the fact which Your Honorable Court pointed out in the *McLaurin* case that the action of the Board was "obviously imposed in order to comply, as nearly as could be, with the statutory requirements of Oklahoma," which **statutory** provisions, as can be plainly seen, were the provi-

sions requiring segregation and not merely provisions creating the Board. A mere resolution of a board not predicated on any statute is not subject to attack for unconstitutionality in an action before a three judge court. See

Borges v. Loftis, 87 Fed. 2d 734, 301 U.S. 687, 57 S. Ct. 789, 81 L. Ed. 1344, 301 U.S. 714, 57 S. Ct. 928, 81 L. Ed. 1366;

Phillips v. United States, 312 U. S. 246, 61 S. Ct. 480, 85 L. Ed. 800;

Railroad Commission of Texas v. Pullman Company, 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971.

This Honorable Court, merely because the District Court did not have jurisdiction, ought not dismiss the appeal but should set aside the judgment and send the suit back to be proceeded with by the District Court in a proper manner, which petitioners contend is clearly the ordinary procedure before one judge. See

Rorick v. Board of Commissioners, 307 U.S. 208, 83 L. Ed. 1242;

Jameson v. Morganthau, 307 U.S. 171, 83 L. Ed. 1189.

If the District Court of three judges was entitled to take jurisdiction of this case, which petitioners deny, petitioners contend that this Honorable Court should have entertained and heard the appeal under the provisions of Title 28, Section 1253, United States Code, which says:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceed-

ing required by any Act of Congress to be heard and determined by a district court of three judges."

Appellants feel that so grave and important a question should not be decided without a hearing before this Honorable Court.

The appeal was a serious and not a frivolous one, and was not one in which delay was being sought since the interlocutory injunction was in full force and the plaintiff was and is now enjoying the rights which he claimed that he was entitled to have protected by the injunction.

This Honorable Court has, in its per curiam, merely referred to the two cases of *Sweatt v. Painter* and *McLaurin v. Oklahoma State Regents.*

Under these circumstances we realize that this Honorable Court has accepted the *Sweatt* case as a yardstick by which can be determined the question of whether or not the plaintiff is deprived of his civil rights in a case of this character.

We respectfully suggest that, even using that case as a criterion, there was no deprivation of civil rights in the instant case.

This Honorable Court has said in the *Sweatt* case that the petitioner might claim as his full constitutional right "legal education equivalent to that offered by the State to students of other races" and that such education was not available to the petitioner in the situation of **promised** equal opportunities

which were all that the State of Texas was able to show in the *Sweatt* case.

Your Honorable Court has quoted with approval the case of *Sipuel v. Board of Regents*, 332 U.S. 631, 92 L. Ed. 247, which held, with regard to furnishing equal protection of the laws:

> "The State must provide it for her (Sipuel) in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group."

Defendants earnestly urge that they be given the privilege of demonstrating that the State of Louisiana has furnished this full constitutional right as soon as applied for, without admitting this plaintiff to the Louisiana State University and Agricultural and Mechanical College.

At the time that this suit was brought Southern University (which had already accepted this plaintiff as a student of law) had an actual law school in existence, with a curriculum, to all intents and purposes, identical with that of Louisiana State University, with competent teachers and an excellent and adequate library, and with everything that was necessary to fit a student of law for what Your Honorable Court has said "is a highly learned profession" but "is an intensely practical one."

This law school at Southern University is not in what Your Honorable Court has called an "intellectual vacuum" but is in an institution that has more "ivy on its walls" than the

present Louisiana State University and Agricultural and Mechanical College.

The Law School of Louisiana State University is not an institution like those of some of the great universities which equip students for the legal profession throughout the English speaking world. The Law School of Louisiana State University, because of the peculiar character of the laws of that State, furnishes nothing more than a practical method of enabling a student to gain admission to the Bar of Louisiana and be competently prepared to practice at that Bar. This is equally offered by the Law School of Southern University.

Colonel George T. Madison, President of the State Board of Education which has the supervision of Southern University and who is also a distinguished member of the Bar and a graduate of Tulane University, has made an affidavit, which is a part of the record herein, that the graduates of Southern University Law School have every opportunity to be as well qualified for the practice of law in Louisiana as the graduates of Louisiana State University Law School, and we do not believe that that testimony can be questioned.

This Honorable Court has said in the *Sweatt* case that it will "adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court" and that "such decisions will be drawn as narrowly as possible." Accepting this limitation, your Honors have **refused to overrule previous decisions** and have simply decided that the State of Texas, with its makeshift school, originated as a separate institution after the suit was brought, did not offer equal opportunities, and that the State of Oklahoma, having received a negro student in the University of Oklahoma,

should give him the same rights therein which were given to white students.

Your Honors have also most wisely stated in the *McLaurin* case that the removal of State restrictions would not necessarily remove individual and group predilections, prejudices and choices.

In view of these principles, we respectfully urge that these appellants should have been given the opportunity to present their case and to show whether or not, in their particular context, equal opportunities have been furnished. To deny this right, we respectfully urge, is, in effect, to overrule both the *Sweatt* and the *McLaurin* decisions.

To deny this right, we respectfully urge, would be tantamount to saying that the negro race has an inherent inferiority which renders its teachers and students incapable of furnishing adequate intellectual associations and that, for that reason, attendance at Southern University Law School, regardless of its quality, must be a deprivation of civil rights.

We respectfully suggest that this Honorable Court grant a rehearing in this matter.

WHEREFORE, petitioners pray that a rehearing be granted in the above numbered and entitled case by this Honorable Court, and that the per curiam judgment affirming the decree of the District Court of the United States for the Eastern District of Louisiana granting an interlocutory injunction be set aside, and that petitioners be permitted to present and argue their appeal before this Honorable Court, and that, in due

course, the aforesaid decree of the District Court of three judges granting the said preliminary injunction be reversed.

Respectfully submitted,

BOLIVAR E. KEMP, JR.,
Attorney General of the State of Louisiana
CARROLL BUCK,
First Assistant Attorney General
HENRY C. SEVIER
C. C. BIRD, JR.
TAYLOR, PORTER, BROOKS, FULLER & PHILLIPS
C. V. PORTER
L. W. BROOKS
JAMES R. FULLER
Attorneys for
Petitioners-Defendants-Appellants

January 10, 1951.

— CERTIFICATE —

We hereby certify that the foregoing petition for rehearing is believed to be meritorious and is presented in good faith and not for delay.

We also certify that on this day we served copies of the foregoing petition upon the attorneys for the plaintiff-appellee

by depositing same in the United States mails, postpaid, addressed to them as follows:

A. P. Tureaud,
612 Iberville Street,
New Orleans, Louisiana.

U. Simpson Tate,
Anderson Building,
1718 Jackson Street,
Dallas 1, Texas.

Thurgood Marshall,
20 West 40th Street,
New York 18, New York.

Baton Rouge, Louisiana, January 11th, 1951.

Bolivar E. Kemp, Jr.
Attorney General of the State of Louisiana
Carroll Buck
First Assistant Attorney General
By E.W.S.
Henry C. Sevier
By E.W.S.
C. C. Bird Jr.
By E.W.S.
TAYLOR, PORTER, BROOKS, FULLER & PHILLIPS
By E.W.S.
C. W. Porter
L. L. Brooks
James A. Fuller

Attorneys for
Petitioners-Defendants-Appellants.